No. 34

In the Supreme Court of the United States

OCTOBER TERM, 1944

THE SAGE STORES COMPANY, a Corporation, and CAROLENE PRODUCTS COMPANY, a Corporation, *Petitioners,*

against

THE STATE OF KANSAS, ex rel. A. B. MITCHELL (Substituted as Attorney General), *Respondent.*

BRIEF AND ARGUMENT FOR THE STATE OF KANSAS

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INDEX

STATUTES AND AUTHORITIES

CASES CITED

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OPINION BELOW

The opinion of the Supreme Court of Kansas (R. 651-702) is reported at 157 Kan. 404, 141 P. 2d 655. A motion for rehearing was denied (R. 821-834) and reported 157 Kan. 622, 143 P. 2d 652. Judgment of the Supreme Court of Kansas was entered October 2, 1943, and judgment denying the motion for rehearing was entered December 11, 1943.

Jurisdiction

Petitioners invoke the jurisdiction of this court to review the judgment of the Supreme Court of the State of Kansas under section 237-B of the Judicial Code as amended by the Act of February 13, 1925.

Statutes Involved

The particular paragraph of the statute involved is paragraph (2) of section (F) of section 707, chapter 65, General Statutes of Kansas for 1935. Said paragraph provides as follows:

> "It shall be unlawful to manufacture, sell, keep for sale, or have in possession with intent to sell or exchange, any milk, cream, skim milk, buttermilk, condensed or evaporated milk, powdered milk, condensed skim milk, or any of the fluid derivaties of any of them to which has been added any fat or oil other than milk fat, either under the name of said products, or articles or the derivaties thereof, or under any fictitious or trade name whatsoever."

The above paragraph was enacted as section 3 of chapter 226 of the Session Laws of Kansas for 1923. It was reënacted as it now stands as a part of chapter 242 of the Laws of Kansas for 1927, and constitutes a part of chapter 65 of the General Statutes of Kansas for 1935 entitled Public Health.

Article 7 of chapter 65, sections 701 to 718, provides for standards of purity, quality and sanitation for dairy products. (The pertinent sections, of which the above paragraph forms a part, are set out in full in the appendix.)

Questions Involved

The Court, in allowing the writ of certiorari, limited its review to the first question presented in the petition for the writ, which raised the following issue:

As applied to petitioners' product "Carolene," does the above statute deny to petitioners rights protected under the due process clause of the Fourteenth Amendment?

Proceedings Below

("R." refers to the Record, "F" refers to Findings of Fact).

On December 14, 1940, the state of Kansas filed an original action in quo warranto in the Supreme Court of Kansas against The Sage Stores Company, a Kansas corporation, and the Carolene Products Company, a Michigan corporation. (R. 1 & 2.)

The petition of the state of Kansas alleged in substance that The Sage Stores Company was abusing its corporate privilege of engaging in the mercantile and produce busi-

ness by its sale of, and keeping in its possession with intent to sell or exchange, milk products to which had been added an oil or fat, other than milk fat, in violation of the milk, cream and dairy public health laws of Kansas, as contained in article 7, chapter 65 of the General Statutes of Kansas for 1935, and more particularly 65-707 (F) (2) G. S. Kan. 1935.

The State further alleged that Carolene Products Company, a Corporation, was organized for the purpose of distributing milk and dairy products to which had been added fats and oils other than milk fats under the fictitious trade names of "Milnut" and "Carolene"; that said Carolene Products Company had a property interest and was a proper party defendant. (R. 308.)

Each corporation filed separate answers, in substance alike, which admitted the sale of such a product, but alleged the prohibition of the sale of the product was unconstitutional. (R. 8-46.)

The State by reply denied the act was unconstitutional, but alleged the measure was designed to preserve the public health, and to prevent fraud and deception in the purchase and consumption of dairy products. (R. 47-53.)

The Supreme Court of Kansas appointed the Hon. J.

B. McKay as Commissioner to take testimony, and to report his findings of fact and conclusions of law. (R. 56.)

The Commissioner, on December 15, 1942, filed his report of findings of fact and conclusions of law. (R. 493.)

The parties had entered into a stipulation of undisputed facts (R. 65) which were adopted by the Commissioner as his first eleven findings of fact.

The Commissioner's findings of fact were based upon extensive testimony of numerous witnesses, taken before the Commissioner between the dates of September 15, 1941, and July 14, 1942, hearings being held at Litchfield, Illinois; New Orleans, Louisiana; Chicago, Illinois; Topeka, Kansas; Kansas City, Missouri; St. Louis, Missouri and Madison, Wisconsin. The transcript of the testimony comprised 1,857 pages, exclusive of approximately 185 exhibits introduced by the petitioners, and approximately 30 exhibits introduced by the State. (R. 2.)

The petitioners excepted to the Commissioner's report of findings of fact and conclusions of law. (R. 522-540.) Some of the exceptions being on the ground that the findings were immaterial, other objections were that additional findings should have been made, but to a majority of the findings the petitioners did not object as not being

sustained by the evidence, and they make no such objections here.

The findings of fact and conclusions of law were adopted by the Supreme Court of Kansas in its opinion (R. 659, 660, 661) and attached to the opinion as a part thereof (R. 653, 654, 680-702).

In the petition for a writ no complaint is made that the findings of fact made by the Commissioner, and adopted by the Supreme Court of Kansas, are not supported by the evidence. Petitioners' only complaint is that conclusion of law No. 12, holding the statute constitutional, was error. (Page 2 petitioners' brief for writ of certiorari.)

The Supreme Court of Kansas noted authorities that supported conclusions of law made by the Commissioner following each conclusion of law in its opinion. (R. 661.)

Statement

The findings of fact, made by the Commissioner, and adopted by the Kansas court, constitute an accurate statement of facts of the case, and show that at the time of filing the petition in this case The Sage Stores Company was a Kansas corporation, doing a retail grocery business, and as such was keeping for sale, having in its possession

with intent to sell, and was selling a product known as "Milnot" and "Carolene," manufactured for and distributed by the Carolene Products Company. (R. 494.)

That Carolene Products Company is a Michigan corporation organized for the purpose of distribution of Milnot and Carolene; that Carolene and Milnot are identical except for the name "Carolene" and "Milnot" contained on the label. (R. 494.)

That petitioners' product is manufactured in creameries of the Litchfield Creamery Company, at Litchfield, Illinois, and at Warsaw, Indiana. (R. 495, R. 6.)

A product made of skim milk and coconut oil was sold under the name of "Carolene" as early as 1917. The name "Milnut" was first used in 1934.

Shortly after the present product, containing cottonseed oil instead of coconut oil, was placed on the market the trade name of "Milnut" was changed to "Milnot." The petitioners' cottonseed oil product was being sold under the name of "Milnut" in Kansas at the time this suit was instituted, and was identical with the product now sold under the trade name of "Milnot" and "Carolene." (R. 506, F. 27.)

"Carolene" and "Milnot" will be referred to herein as "petitioners' product."

Petitioners' product is manufactured from whole milk produced in the vicinity of the Litchfield and Warsaw plants. (R. 504, F. 23.)

From the whole milk cream is separated, and the skim milk is used in the making of petitioners' product. The ingredients of petitioners' product are skim milk, refined hydrogenated cottonseed oil, and vitamins "A" and "D." The product is manufactured in sanitary creameries in the same manner as whole or skim milk is evaporated in the manufacture of evaporated milk. The volume of skim milk is reduced to forty percent of its original volume solely from loss of water. The product is put up in hermetically sealed cans, thoroughly sterilized, in the same manner as canned, evaporated whole milk, and is free of bacteria. (R. 495, F. 6.)

Each 14½ ounce can of petitioners' product contains 2,000 U. S. P. units of vitamin "A" and 400 U. S. P. units of vitamin "D." (R. 496, F. 7.)

It contains six percent fat (R. 496, F. 9), which fat is hydrogenated cottonseed oil, which oil is extracted from the cottenseed by a crushing and pressing process. This crude oil is treated with caustic soda, is bleached with Fuller's earth, and the natural stearins removed, and hydrogen is added to the unsaturated portions of the fat,

and it is then deodorized, resulting in an odorless, colorless, tasteless fat, called hydrogenated cottonseed oil. It is this hydrogenated cottenseed oil which petitioners use in the manufacture of their product. (R. 496, 497, F. 12.)

Petitioners' product is packed in cases containing either forty-eight 14½ ounce cans, or ninety-six six-ounce cans. The cans are the same size, and the number of cans per case is the same as are used in shipping and packing evaporated whole milk. (R. 507, F. 28.)

The method of sale and distribution of the product is through wholesalers and brokers to retail grocers. (R. 507, F. 29.)

Petitioners' product during 1940 and 1941 was sold in the State of Kansas by retail stores by displaying it with or near evaporated milk. When inspectors at a majority of the stores called upon, asked for a cheap canned milk, petitioners' product was sold without disclosing the nature of the product. Housewives called the product "Milnot Milk" and some retail grocers referred to it as such. (R. 508-9, F. 31-32.)

Petitioners' product closely resembles evaporated whole milk in taste, consistency, odor and appearance. The average consumer could not distinguish between them by taste, smell or appearance. (R. 509, F. 33.)

Retail grocers advertised the product in newspapers, calling it "Milk, Milnut, it whips," "Milk, Carolene brand," "Carnation Milk," "Milnut Milk," "Milnut canned Milk" and "Milk." (R. 5-10, F. 34.)

The retail selling price of the product is approximately one cent a can less than that of evaporated whole milk. (R. 511, F. 35.)

Retailers are furnished booklets containing sixty recipes, in all of which petitioners' product is used as an ingredient instead of milk or cream. Some of the recipes are entitled, "Boston Cream Pie, Cream Pie, Strawberry Ice Cream, and Creamy Fudge." On the back of the recipe book it is stated, "Milnot can be used for all culinary purposes wherever you now use whole milk, cream, whipping cream, or a canned milk." (R. 511, F. 37.)

Petitioners' product is used as a substitute for milk and cream, and has no other use. The product is susceptible of being sold as and for evaporated milk, and is so sold. (R. 522, F. 11.)

Hydrogenated cottonseed oil, skim milk, and vitamins "A" and "D" are each wholesome, nutritious and harmless foods, and there is no history of injury resulting from their use as food for human consumption. (R. 496-500, F. 12, 13, 14, 15, 16.)

Petitioners' product is wholesome, nutritious and harmless in the sense that it contains nothing of a toxic nature. (R. 519, F. 53.)

The word "wholesome," as used in the field of nutrition, and in the Commissioner's findings, means a food which is non-toxic, and can be used by the body. "Nutrition" means, "containing food values," and "nutritive value," is a term used to indicate the kind and quantity of nutrients contained in a food. A food may be wholesome and nutritious, and harmless in the sense that it is non-toxic, and yet be incapable of sustaining human life for a very long period. It would not be adequate, or a complete food. Disease is caused by what the diet does not contain, as well as by what it does contain. Pellagra, for example, is caused by a partially inadequate diet. (R. 500, F. 17.)

Petitions' product is inferior to evaporated whole milk in its contents of (1) fatty acids, (2) phospholipins, (3) sterols, (4) vitamin "E," (5) vitamin "K," and (6) growth promoting properties found in butterfat and not in cottonseed oil. All of these nutrients are essential in human nutrition. While these deficiencies *may* be made up in the diet of an adult who consumes a varied diet, *such deficiencies are not made up when petitioners' product*

is used as a substitute for whole milk, or evaporated whole milk in the diet of infants and children who do not consume a varied diet, and the diet is partially inadequate. Petitioners' product does get into the channels of infant nutrition. (R. 519, F. 53.)

No other fat approaches butterfat in the number and assortment of fatty acids. Butterfat contains nineteen and cottonseed oil six. All vegetable and animal fats are composed of hydrogen, oxygen, and carbon. The combination of these elements determines the character of the fat. (R. 513, F. 41.)

From experiments conducted by distinguished scientists in the field of biochemistry, it was proved that butterfat contains a superior growth promoting property not contained in vetgetable oils, including cottonseed oil, which property was probably contained in the long chain saturated fatty acids present in butterfat in small amounts, and not present in the vegetable oils. (R. 517, F. 51.)

Whole milk contains phospholipins. They are utilized in building body tissue, particularly nerve sheaths, and are necessary in human nutrition. (R. 514, F. 44.)

Sterols are found in whole milk, and upon separation of the cream from the milk largely go with the cream. They are essential in human nutrition. (R. 514, F. 45.)

Vitamin "E," a fat soluble vitamin, is necessary for reproduction, cell division, and muscular vigor, and lack of vitamin "E" is associated with sterility and muscular dystrophy. (See tabulation of known vitamins, R. 501.)

Vitamin "K" is necessary for normal functioning of the liver to permit blood clotting, and the deficiency thereof is associated with hemorrhagic disease and faulty blood clotting. (See table of vitamins, R. 501.)

Information obtained by the biochemist from his animal experiments is passed on to the physicians, and incorporated in treatment of human beings. Not all results obtained from animal experiments are applicable to human beings, but such experiments cannot safely be ignored. A pediatrist would proceed cautiously in feeding a baby food which has proved to be unsatisfactory in the diet of animals. (R. 516, F. 50.)

There is a difference between vegetable oils and butterfat which can be demonstrated on animals. The substitution of vegetable oils for butterfat in the diet of infants and children should not be allowed until there is a large human experience with babies. (R. 518, F. 52.)

Not all of the vitamins which are necessary in human nutrition have been identified. Numerous attempts have

been made to rear various types of animals on diets containing no vitamins, except those which have been identified. All such attempts have failed. *However, the human being may obtain an adequate supply of these essential, but unknown vitamins, by consuming a varied diet of natural food stuffs.* (R. 515, F. 48, Vitamin Chart R. 501.)

All known vitamins are present in whole cow's milk, but neither whole cow's milk nor any other single food is an adequate source of all of the vitamins. Whole cow's milk comes closer than any other food to supplying the necessary vitamins for human life. (R. 502, F. 19.)

Milk is not a complete food for human beings, since it is deficient in iron, copper and manganese, and vitamin "D." However, it is more complete than any other food, and cow's milk is the best known substitute for breast milk for the human infant. (R. 502, F. 20.)

There is widespread malnutrition in the United States and in Kansas. (R. 498, F. 13.)

A study of the nutritional status of school children in the State of Kansas, under the direction of the State Board of Health, indicates that approximately 25 percent of the school children suffer from malnutrition. The principal deficiency is food rich in nutrients. The reasons for the nutritional deficiency are: (1) Lack of adequate income

with which to purchase proper foods; (2) lack of information as to what are the proper foods, and (3) lack of interest. Workers in the State and Federal nutrition service in Kansas oppose the sale of a product like petitioners' because it is not an adequate substitute for whole milk, and would require the education of housewives in the necessity of using other foods to supply the nutrients present in whole milk, but not in petitioners' product. (R. 512, F. 39.)

Petitioners' product has good customer acceptance because—(1) It is used by families in low income group; (2) some consumers prefer its taste over evaporated milk; (3) it will whip, and (4) hydrogenated cottonseed oil resists rancidity, and will keep longer. (R. 511, F. 37 and 38.)

The operation of the Litchfield Creamery Company has been of economic benefit and advantage to the dairy farmers in the vicinity of the two plants. The patent of the process has expired, and there is nothing to prevent other evaporated milk manufacturers from engaging in the business if it becomes legal. The business is a profitable one; and other evaporated milk companies will enter the field if and when filled milk can legally be manufactured and sold. (R. 505, F. 26.)

The operation of petitioners has increased the income of dairy farmers locally, but it does not follow that the income of dairymen generally will be increased if the business is engaged in on a competitive basis, and on a nationwide scale, as butterfat so removed and replaced with vegetable oil is thrown on the market in some other dairy product such as butter. The milk price is largely governed by the butter market. Such unrestricted manufacture of filled milk would decrease prices paid to farmers for whole milk. (R. 506, F. 26.)

In 1940 the Litchfield Creamery Company purchased whole milk for which it paid $2,068,483.62, and skim milk for which it paid $57,078.09. In the same year it sold 1,100,000 cases of Milnut, and sold 5,368,000 pounds of butter at a price of $1,609,121.42. (R. 504, F. 23.)

In 1940 Kansas produced 3,030,000,000 pounds of milk of a value of $40,905,000.00, and 73,806,166 pounds of butter. 8,400,000 acres of land in Kansas was devoted to dairying, and buildings and equipment thereon were worth $247,800,000.00. There is a total investment in the dairy industry in Kansas of $315,678,000.00. (R. 504 and 505, F. 24.)

The quality of milk and dairy products is directly influenced by the economic condition of the dairy industry.

When milk cannot be produced and sold profitably, there is a tendency for dairymen not to keep their equipment in first-class condition, and not to feed their cows an adequate supply of the proper foodstuff. A sound economy for the dairy farmer is essential for the production of an adequate supply of pure, wholesome milk. (R. 505, F. 25.)

The unrestricted sale of filled milk on a competitive basis, on a nationwide scale, would result in unsound economy of the dairy farmer, resulting in an inadequate supply of pure, wholesome, sanitary milk, thereby affecting the public health of the people. (R. 503-506, F. 24-26.)

Summary of Argument

Under the statute involved it is unlawful to manufacture, sell, or keep for sale or exchange milk products to which have been added a fat or oil other than milk fat. Petitioners' product, being a compound of evaporated skim milk, hydrogenated cottonseed oil, and vitamins "A" and "D," falls clearly within the terms of the statute. Whole milk occupies a unique place in the human dietary. It is basicly the sole food of young children. No other food is so completely guarded by protective legislation as is milk. The purpose of the act is to protect the integrity of milk and to outlaw inferior products lacking

in essential nutrients, and so resembling the genuine article as to be readily susceptible to fraudulent substitution. The purpose of the statute is to protect the public health, and to protect the public against the evils of substitution of an inferior food for the genuine milk through fraud, deception or confusion.

Petitioners' product is distributed in the same channels as genuine evaporated milk. It is canned, packaged and displayed in the same maner as genuine evaporated milk. It has been advertised and sold to Kansas consumers as and for the genuine evaporated milk. Retailers as well as consumers confuse it with evaporated whole milk. The label, and statements, and the manufacturer's alleged desire that it be not confused with milk do not in fact avail to protect the consumer against the evils of misrepresentation, fraudulent substitution and confusion; and, because of the price, ignorance of food value, and inertia on the part of the consumers, the product is sold and used as and for genuine evaporated whole milk.

When petitioners purchase whole milk and separate the cream therefrom they remove butterfat, which contains nineteen animal fatty acids, and substitute in the added cottonseed oil but six vegetable fatty acids. Along with the butterfat are removed phospholipins, sterols, vitamins

"E" and "K," and a growth promoting factor found in butterfat and not in vegetable oil, including hydrogenated cottonseed oil. None of these essential nutrients is replaced by the addition of vitamins "A" and "D" and hydrogenated cottonseed oil.

These nutrients, removed from whole milk and not replaced in petitioners' product, are essential to the proper growth and development of small children. The product is used in the diet of infants and children. The product in color, odor, taste and consistency is indistinguishable from the genuine product. The ordinary consumer cannot distinguish between them. The product has no other use than as a substitute for milk or cream, and, when used, crowds out of the diet the genuine product, resulting in malutrition.

The unrestricted manufacture, sale and distribution of the product would demoralize the economic status of the dairy farmer, resulting in an inability to provide high quality, pure, wholesome and sanitary milk.

As applied to the petitioners' product, the Act has a rational basis grounded on the power of the State to safeguard public health and to prevent fraud and deception upon the consumers of the state.

Whether the purposes of the statute can be attained by

regulation, or whether prohibition is necessary under the foregoing facts, are questions for the legislature. The product is clearly within the statute, and the addition of vitamins "A" an d"D" only makes the forbidden product more nearly like the genuine article, and, therefore, more available as a fraudulent substitute.

Argument

INTRODUCTORY.—The statute involved is a part of chapter 65, G. S. Kan. 1935, which deals generally with Public Health. Section 707 of chapter 65, which is reproduced in the appendix to this brief, defines and prescribes standards of quality for milk and dairy products. Section 707 (F) (1) defines and fixes specific standards for condensed or evaporated milk and for condensed or evaporated skimmed milk, and makes unlawful the sale of the defined products if they do not conform with the standards prescribed. Section 707 (F) (2) of said chapter 65 specifically prohibits the sale of evaporated skim-milk to which has been added any fat or oil other than milk fat. Plaintiff's product, being a compound of evaporated skimmed milk and cottonseed oil, clearly falls within the prohibition of section 707 (F) (2), which is an integral part of section 707 (F), which is intended to secure definite

standards of quality in widely used and well known articles of food. There is no longer any question that Congress or a legislature has power to prescribe such standards. (*U. S. v. Carolene Products Co.*, 304 U. S. 144, 58 S. Ct. 778, 82 L. Ed. 1234; *Federal Security Administrator v. Quaker Oats Co.*, 318 U. S. 218, 63 S. Ct. 589, 87 L. Ed. 724.) If so, there must be, and there is attendant power to protect such standards against impairment. (*Hebe Co. v. Shaw*, 248 U. S. 297, 39 S. Ct. 125, 63 L. Ed. 255.)

The Kansas statute does not stand alone in condemning sales of filled milk. More than thirty states have prohibited the manufacture and sale of milk or milk products to which fats or oils, other than milk fats, have been added. The pertinent statutes are listed at footnote 3, page 150 of *U. S. v. Carolene Products Co.*, supra. Florida and Kentucky have enacted prohibitory filled-milk laws since the last mentioned case was decided by this court. Both statutes have been sustained. (*Carolene Products Co. v. Hanrahan*, 291 Ky. 417 [1941], 164 S. W. 2d 597; *Setzer v. Mayo*, 150 Fla. 734 [1942], 9 So. 2d 281.) These circumstances, standing alone, evidence a fact that the filled-milk law of Kansas does not represent an arbitrary whim of the legislature.

The federal Filled-Milk Act and the Kansas filled-milk

law were both enacted in 1923. The federal Filled-Milk Act was adopted after extensive hearings before the appropriate House and Senate committees in the course of which eminent scientists and health experts testified. The reports of these committees showed filled-milk to be lacking is essential nutrients, and that it was sold as and for whole evaporated milk; that the use of filled-milk as a substitute for milk is generally injurious to health, and facilitates fraud upon the public. (H. R. 365, 67th Congress, 1st Sess.; Senate Report No. 987, 67th Congress, 4th Sess.; *U. S. v. Carolene Products Co.*, 304 U. S. 144, fn. 2, 58 S. Ct. 778, 82 L. Ed. 1234.)

The above facts existed when the Kansas law was enacted. Said congressional reports were public documents, and it must be presumed that the legislature of Kansas had available the known facts at that time. Such facts show the evil against which the State and Federal laws were directed.

In *Carolene Products Co. v. Mohler*, 152 Kan. 2, p. 8, 102 P. 2d 1044, the Supreme Court of Kansas in holding constitutional the same section in question, as applied to an identical product of the Carolene Company, with the exception that in that case the oil was six percent coconut

oil instead of six percent hydrogenated cottonseed oil, observed:

> "The statute involved is a part of the public-health statute of the state . . . and was defined in the preamble to the act to design standards for dairy products, and as such exists for the protection of the public health and general welfare of this state. The statute forms a part of the general milk, cream and dairy products law of this state and is, therefore, but one of a large number of specific acts designed to protect the public in the use and consumption of milk, cream and dairy products in the broad conception of those terms.
>
> "It is clear the statute before us . . . has a two-fold purpose: (1) Preservation of the public health, and (2) prevention of fraud and deception on the consumers of this state." pp. 8 and 9.

The evil that Congress and the Kansas Legislature struck at in 1923, was an adulterated milk product stripped of nutrients and palmed off on the public as the genuine article, thereby affecting the public health and facilitating fraud and deception.

The most recent decisions of this court, and of the lower federal courts, and of state courts, indicate that the rationale of the filled-milk laws is established, and that judicial inquiry into the merits of the product, or the motives of the legislative bodies in enacting the laws, are no longer open to question. In considering the above

matter in connection with the federal statute, this court said in the *U. S. v. Carolene* case, supra:

> "Here the demurrer challenges the validity of the statute on its face and it is evident from all the considerations presented to Congress, and those of which we may take judicial notice, that the question is at least debatable whether commerce in filled milk should be left unregulated, or in some measure restricted, or wholly prohibited. As that decision was for Congress, neither the finding of a court arrived at by weighing the evidence, nor the verdict of a jury can be substituted for it. *Price v. Illinois*, 238 U. S. 446, 452; *Hebe Co. v. Shaw*, 248 U. S. 297, 303; *Standard Oil Co. v. Marysville*, 279 U. S. 582, 584; *South Carolina v. Barnwell Bros., Inc.*, 303 U. S. 177, 191, citing *Worcester County Trust Co. v. Riley*, 302 U. S. 292, 299."

The Kentucky supreme court in *Carolene Products Co. v. Hanrahan*, supra, in which the Kentucky statute was held valid upon demurrer, adopted the views of this court expressed in the *Carolene Products Co.* case, saying:

> "Appellant seizes on the first sentence of the quoted language as indicative of its right to have a judicial inquiry as to the existence of a rational basis for the Act and contends that the facts alleged in the petition, admitted true on demurrer, negative the existence of such a rational basis. But this contention does not give due consideration to the subsequent language narrowly circumscribing the scope of judicial inquiry as to a ra-

tional basis. It is apparent that the Supreme Court in that opinion took into consideration such arguments against the constitutionality of the Act as could be based on any and all facts alleged in the petition in this case. That decision is conclusive on the question of constitutionality of the Act in so far as the federal question is concerned, and the fact that, since the decision, appellant has added vitamins to its product and that there has been no congressional or legislative investigation or report on the subject, in no way detracts from its binding effect, for the addition of the vitamins has the effect only of making its product more wholesome and nutritive and the wholesome and nutritive character of the product was assumed by the Supreme Court when the decision was reached;" also *Carolene Products Co. v. Wallace*, 27 F. Supp. 110, 112-113, (D. D. C.), affirmed *per curiam*, 307 U. S. 612; *Carolene Products Co. v. Wallace*, 30 F. Supp. 266, affirmed *per curiam*, 308 U. S. 506; compare *Setzer v. Mayo*, 150 Fla. 734 (1942).

The above decisions, which are followed in *U. S. v. Carolene Products Co., et al.*, (1943), 51 Fed. Sup. 675 (District Court), 140 F. 2d 61, (1944) (Circuit Court of Appeals), now pending here on certiorari, this term, hold that the rationale of the federal filled-milk act is not open to judicial inquiry since facts and circumstances, of which the courts can take judicial notice, sustain the legislative judgment of Congress in enacting the law. All decisions, federal and state, which have sustained filled-milk laws,

have assumed that the questioned product was wholesome in the sense that it is nontoxic. In this case petitioners have urged that they now have a new and different product, which, with its added vitamins "A" and "D," is actually equal or superior to whole milk in nutritive value. Petitioners have been given full opportunity to present the merits of their claims in this connection. This brief will support the views of the Supreme Court of Kansas holding that the statute, as applied to petitioners' product, is a valid and constitutional exercise of the State's power for the following reasons:

1. The statute is sustainable as a measure to safeguard public health, and, as such, does not violate the Fourteenth amendment to the Constitution of the United States.

2. The statute is sustainable as a measure to protect the public against fraud and deception.

I

THE STATUTE IS SUSTAINABLE AS A MEASURE TO SAFEGUARD PUBLIC HEALTH, AND, AS SUCH, DOES NOT VIOLATE THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES

We start with the admitted facts that plaintiffs' product is practically indistinguishable from evaporated whole milk in color, taste and consistency (F. 33, R. 694); that it has no use other than as a milk substitute (F. 38, R. 695); and that the manufacturer advises consumers that Carolene "can be used for all culinary purposes wherever you now use whole milk, whipping cream or canned milk." (F. 36, R. 695.)

Petitioners express surprise that the Kansas court adopts the following language in its opinion:

> "For the purpose of determining the constitutionality of the law in question it is immaterial whether *we* believe defendant's product when considered as a whole is inferior, equal or superior to whole milk or evaporated whole milk if substantial disagreement in fact exists with respect to the inferiority of the product as compared with whole milk or evaporated whole milk, and the legislature has some basis for believing a filled-milk product is likely to be sold or is susceptible of being sold as and for whole milk or evaporated whole milk with the result that the public may be deceived thereby." (157 Kan. 404, 412.)

No new rule is embodied in the above expression. The court holds that the legislature is entitled to its own judgment as to the need for the legislation, when it appears that there is a rational basis in fact for the exercise of that judgment.

The court believed, after an independent examination of the record, that the facts were such as would justify the exercise of the legislative discretion to ban a product reasonably believed to be inimical to the public health, and which is susceptible to fraudulent dealings.

The court has found that there exists "substantial disagreement in fact with respect to the inferiority of the product as compared with whole milk or evaporated whole milk." (R. 660.)

Petitioners attempt to meet this situation by a denial that there is any such disagreement. They assert that, at most, their product may be deemed inferior to milk *if used during the first four months of human life.* They conclude that over this short span the inferiority of their product would be inconsequential. The record establishes conclusively that the gravest threat to the public health lies in the use of this product in infant nutrition. "A legislature or a court can take notice of the fact that during the first four months of life the normal infant must rely

on milk as substantially its only source of food. No other basic food is received by babies in the early months of growth. Doctor Zentay, a witness for the State, testified (R. 243) that an infant may be fed exclusively on milk up to the age of three months. Doctor Hartmann, a State's witness, testified (R. 214) that it was common practice to begin to supplement the infant's exclusive milk feedings at the age of 4, 4½ or 5 months. The "brief period," which petitioners would dismiss as inconsequential is, in fact, the crucial period of growth when the requirements of nutrition are more critical than at any other time and when the infant must look to a single source of nutriment. The experiments of Doctor Hart and Doctor Elvehjem, testing the comparative nutritive values of butterfat and vegetable oils emphasized that the striking differences in the growth promoting factors are manifested in the early growth period of animals. Doctor Hart stated (R. 332) that the results of his findings "made it clear that filled-milk should not be allowed to get into the channels of infant and child nutrition."

When it is considered that 50% of the babies are fed artificially, that is, with cow's milk or evaporated whole milk, (R. 214) it becomes clear that the first four months

of infant life constitute a most critical period in the life span of the child during which dietery inadequacy results in irreversible harm to growth and development. A prime purpose of the statute is to safeguard the character and quality of the basic food, milk, which is the normal infant's sole source of sustenance.

Petitioners' repeated assertion that there now exists no "substantial disagreement" with respect to the relative nutritive values of their product and "whole milk" or "evaporated whole milk" is not sustained by the record. Petitioners realize that if, in fact, there is a substantial difference of opinion as to the health properties of the product, when used as it is used as a milk substitute, then the charge that the statute has no rational basis, must fall. The restatement of the views of certain of their witnesses to the effect that no disagreement exists among experts as to the inferiority of the product, as compared with milk, does not overcome the positive statement of the court below as follows (R. 665):

> "While it probably is true the legislature, when it enacted the statute, did not have knowledge of defendant's particular product, it is also true the product is clearly within the prohibition of the statute and that the question of its inferiority as compared with products containing milk fat remains a debatable question among scientists to-

day. Under these circumstances we cannot say the product is not now within the terms of the statute."

And the Commissioner recognized this disagreement as a material factor in the case, stating in his findings of fact No. 53 (R. 700):

> "In the foregoing findings, some of the respects in which such experts disagree have been pointed out for the reason that (under the view the commissioner takes of the law) the fact that the experts do so disagree is itself a material fact. Such differences of opinion are due in part to the recognized human tendency to draw different conclusions from the same facts and in part to the fact that the experts were testifying on subjects concerning which the store of knowledge is still far from complete. New discoveries are constantly being made. At the time the evidence was being taken, an important rat experiment was being conducted on a larger scale than any heretofore attempted.
>
> "The case, however, must be determined in the light of present-day knowledge, as shown by the evidence introduced."

Petitioners do not deny the specific finding that its product is inferior to evaporated whole milk in the content of fatty acids, phospholipins, sterols, vitamin "K," and unidentified growth promoting properties found in butterfat and not in cottonseed oil, essential to the optimum growth of infants. (F. 53, R. 519.)

Petitioners cannot escape the conclusion of the lower court, that the record in this case establishes that there exists substantial disagreement today as to whether filled-milk can with safety to the public health be permitted to get into the chanels of infant nutrition.

Since the character and effect of the article, as intended to be used, is debatable the legislature is entitled to its own judgment, and its judgment cannot be superseded by the views of the Court. (*Hebe Co. v. Shaw*, 248 U. S. 297, 303, 39 S. Ct. 125, 63 L. Ed. 255; *Carolene Products Co. v. Mohler*, 152 Kan. 2, 8, 102 P. 2d 1044; *U. S. v. Carolene Products Co.*, 304 U. S. 144, 58 S. Ct. 778, 82 L. Ed. 1234; *Setzer v. Mayo*, 150 Fla. 734, 9 So. 2d 281.)

Petitioners contend that the separate ingredients of their product are wholesome, nutritious, harmless, and that there is no history of injury resulting from use of such ingredients as food for human consumption. The Kansas court found this to be true as to the separate ingredients, and also found in Finding 53 that the product was wholesome, nutritious and harmless *in the sense that it was not toxic*. Evidence showed, and the court found, that even though a product is wholesome, nutritious and harmless in the sense that it is not toxic, yet if it is not adequate to supply the nutritional requirements expected

of it, and intended to be supplied by its use it can and does cause illness and disease just as if it were toxic. Pellagra, for example, is not caused by the food people consume, but is the result of the lack in the diet of an essential nutrient, nicotinic acid. Foods lacking this essential nutrient which constitute the diet, crowd out those foods which the people should consume. Thus, just as lack of essential nutrients causes pellagra, the use of filled milk, lacking in essential nutrients, crowds out of the diet the genuine milk containing such nutrients. Long continued use of a partially inadequate diet results in mulnutrition and disease. As shown by the vitamin chart, many nutrients called "vitamins" are necessary for the normal functioning of the body, and to prevent certain diseases. There is necessity for, and disease results from, the lack of many nutrients which have not been characterized. Professor Hart, head of the Department of Biochemistry of the University of Wisconsin, in his testimony (R. 314) stated:

> "That there are no doubt chemical units still unidentified in milk, such as the grass juice factor; that the constituents of milk fat are only partly known, and they sustain particular relations to the nutrition of the young, so there are probably many nutritional factors in milk that are still to

be identified; that there is still progress to be made in the actual chemical units needed by an animal; that he would say that *science still must depend upon certain food substances in order to prepare a complete diet.*" (Italics ours.)

The petitioners' product upsets the delicate inter-relationship of nutrients contained in a natural product. This idea was stated by Dr. Conrad A. Elvehjem, eminent in the field of vitamin research, as shown in the record, page 340, as follows:

"Q. How can the infant who is deprived of mother's milk be assured of sufficient vitamin intake? A. An infant deprived of mother's milk probably doesn't have the assurance that an infant getting mother's milk has, but the next best assurance would be the use of whole cow's milk.

"That all the known vitamins are present in milk, on a qualitative basis, but they differed greatly in quantity so one did not want to accept whole cow's milk as being an adequate source of all the vitamins, though it was adequate considered in the light of what nature intended; that milk was low in D, but nature probably intended we should get some from sunlight; that milk was fairly low in B^1 but high in fat, which had a saving effect on the B^1 requirement (T. 1162); that there was enough C in milk if one's entire diet was milk, that the fat soluble vitamins were found in the fat part of the milk and the water soluble vitamins in the water portion; *that the relationship of the quantity of vitamins in milk apparently had something to do*

with the other constituents in milk; that milk was rich in B_6 but low in the unsaturated fatty acids, and choline was relatively low in milk but the milk protein compensated to some extent; *that the longer one worked in the field of nutrition, the more impressed he was (T. 1163) with the delicate inter-relationships of all the nutrients of milk; that he would hate to tamper with natural foods in the dietary of the human.*" (Italics ours.)

The animal experiments conducted by Professor Hart and Doctor Elvehjem, showing butterfat to contain a growth promoting factor not found in vegetable oils, supports the above testimony. Results of such experiments are shown by charts. (R. 575-581, and by the pictures of animals used R. 576, 582, 586, 587, 589, 591.)

These pictures illustrate the effect of the properties in butterfat, not found in petitioners' product, which produce superior growth and development. In these experiments everything else in the diet was equal, other than the butterfat and the vegetable oil.

In the hearings before Congress in 1923 the opponents of the bill made the same contentions then as are now contended, among which were that the product was wholesome, nutritious and harmless. In answer to opponents' position Representative Voight made the following statements:

> "I will say to you gentlemen that there is nothing poisonous or deleterious in this milk compound. I will say further that I do not object to what the compound contains so much as I object to what it does not contain. The fact that this article is not deleterious, or not poisonous, does not meet the argument. You can mix milk with water and there is nothing injurious or poisonous about it, but it is considered everywhere in the country that that is a fraud on the consumer."

He further states:

> "This substitute does have food value, but the main defect in it is that it has not the food value which is necessary for the growth of children and infants."

He further states:

> "The trouble is that this article is sold for milk, and is used for milk, when it does not have the same nutritive elements that milk has, and it is sold, notwithstanding the label, in such a way as to perpetrate a fraud on the consumers of the country."

It is evident that when Congress and the Kansas Legislature considered filled-milk in 1923 they were not deceived as to the evil they intended to prevent. They intended to prevent the palming off on the public of an inferior milk compound, stripped of elements essential to the diet of the people, and the maintenance of health,

and which articles could not be distinguished from the genuine article, and which was actually sold and used by the consumer as and for the genuine article, and not knowing that it did not contain the essentials expected of it, thereby promoting malnutrition.

Nutritional defects do not appear over a short period of time. Dr. Alexis F. Hartmann, professor of pediatrics at Washington University, St. Louis, stated that nutrition deficiencies might not be manifested for a long period of time, and before a food product can be said to be adequate "we would want to show that babies not only develop through infancy but through childhood, become adults and can go ahead and have offspring who also seem normal and are capable of developing normally before we would ever prove that point." (R. 208.)

The finding that there has been no history of injury from the use of the separate ingredients in petitioners' product does not establish that the product itself is necessarily harmless. In *State v. Layton*, 160 Mo. 491, 61 S. W. 171, a statute prohibited the use of alum in baking-powder. There was only a question of public health involved. There was no genuine natural product involved. The defendant insisted that his baking-powder was perfectly healthful, had been in universal use for thirty years, that

not a *single instance had been reported* of a person being sick from its use. The court sustaining the statute observed:

> "It may be . . . that . . . it cannot be shown that any particular person has ever lost his health from their use, but that the legislature deemed their use deleterious cannot be denied, and there is no such conclusive evidence to the contrary as to justify this court in holding that this act, intended for the benefit of the public health, is void."

The fact that it could not be shown that any particular person lost his health from the use of alum in baking-powder was not proof that the law was an arbitrary and unwarranted exercise of the police power.

The essence of petitioners' position is that they have a constitutional right under the Fourteenth Amendment to make an adulterated and synthetic product which is in imitation and semblance of the genuine article, so closely resembling the genuine article that the ordinary consumer cannot distinguish between Carolene and genuine evaporated whole milk by odor, taste or consistency, and that the synthetic article of food (Carolene), stripped of essential nutrients, and used in the diet under the impression it contains such nutrients, is immaterial, so long as their product is sanitary and not toxic, and is plainly

labeled. Such position of petitioners amounts to no more than saying that they have a constitutional right of injuring the health of the people, and foisting upon them, through fraud, deception and confusion, a product they did not intend to buy. Such position is recognized by this court as being untenable. Although the false article is as good as the true one, the privilege of deceiving the public, even for their own benefit, is not a legitimate subject of commerce. (*Worden & Co. v. California Fig Syrup Co.*, 187 U. S. 516, 529, 47 L. Ed. 282.)

The police power covers all matters having a reasonable relation to the protection of the public health, safety and welfare. (*McLean v. Arkansas*, 211 U. S. 539, 53 L. Ed. 315.)

As applied to foods this authority extends to requiring a fixed minimum amount of nutritional elements. (*Hutchinson Ice Cream Co. v. Iowa*, 242 U. S. 153, 37 S. Ct. 28, 61 L. Ed. 217; *Hebe Co. v. Shaw*, 248 U. S. 297, 39 S. Ct. 125, 63 L. Ed. 255.)

The police power also has an exceptional appropriate field of action in the prevention of fraud and deception. (*Hall v. Geiger-Jones*, 242 U. S. 539, 37 S. Ct. 217, 61 L. Ed. 480.)

It may be legitimately exercised against even the occa-

sional fraud not inherent in the business or product, as well as against fraud that is inherent in the business or product. (*Merrick v. Halsey & Co.*, 242 U. S. 568, 37 S. Ct. 227, 61 L. Ed. 498.)

Given a legitimate subject for the exercise of the police power it is for the legislature to adopt such measures as it may deem necessary to make its action effective so long as they have reasonable relations to that end. (*Purity Extract & Tonic Co. v. Lynch*, 226 U. S. 192, 33 S. Ct. 44, 57 L. Ed. 184.)

The measure which the legislature may adopt for such purpose may either be regulatory or prohibitory, whichever the legislature deems the more effective method of accomplishing the result. (*New York v. Hesterberg*, 211 U. S. 31, 29 S. Ct. 10, 53 L. Ed. 75; *Price v. Illinois*, 238 U. S. 446, 35 S. Ct. 892, 59 L. Ed. 1400.)

Accordingly, the authority of the legislature to prohibit an article is not affected by the fact that the article may be truthfully labeled, or that the law will result in destroying the value of property devoted to the manufacture of such article. (*Hebe Co. v. Shaw*, 248 U. S. 297, 39 S. Ct. 125, 63 L. Ed. 255; *U. S. v. Carolene Products Co.*, 304 U. S. 144, 58 S. Ct. 778, 82 L. Ed. 1234; *Mugler v. Kansas*, 123 U. S. 623, 8 S. Ct. 273, 31 L. Ed. 205.)

In *Hebe Co. v. Shaw*, 248 U. S. 297, 39 S. Ct. 125, 63 L. Ed. 255, involving a product consisting of skim-milk and coconut oil, this court upheld the constitutionality of the Ohio statute, saying:

> "The purposes to secure a certain minimum of nutritive elements and to prevent fraud may be carried out in this way even though condensed skimmed milk and Hebe both should be admitted to be wholesome."

In the case of *State v. Emery*, 178 Wis. 147, 189 N. W. 564, the court speaking of the police power said:

> "As applied to food this authority extends to requiring a fixed minimum of nutritional elements."

In *Poole & Creber Market Co. v. Breshears*, (Mo.) 343 Mo. 1133, 125 S. W. 2d 23, the Missouri court observed:

> "Concede that they contain no ingredients which, of themselves, are deleterious to health. That alone is not sufficient . . . Those products are lacking in an element, essential to growth and health, contained in the genuine article."

And this court in *United States v. Carolene Products Co.*, supra, stated:

> "In twenty years evidence has steadily accumulated of the danger to the public health from the general consumption of foods which have been stripped of elements essential to the maintenance of health."

The Kansas court found that the quality of milk in dairy products is directly influenced by the economic condition of the dairy industry, that when milk cannot be produced and sold profitably, there is a tendency for the dairyman not keep equipment in first class condition, not to feed cows an adequate supply of proper foodstuffs; that a sound economy for a dairy farmer is essential for the production of an adequate supply of pure, wholesome milk; that failure to maintain this standard quality of milk would affect the public health.

Although petitioners pay a slightly higher price for raw milk locally, such would not be true if filled-milk were manufactured on a nationwide scale by all evaporators in open competition. The result would be economic disaster to the dairy farmers, resulting in the breaking down of the standards of purity, quality and sanitation, thereby affecting the public health. This ground alone would be sufficient for sustaining the statute. (*Nebbia v. New York*, 291 U. S. 502, 54 S. Ct. 505, 78 L. Ed. 940.)

The court below on this issue stated:

> "The legislature, in the enactment of the law, had the right to weigh every factor germane to the public health, including economic considerations, and we cannot assume it did not do so." (R. 665.)

It, therefore, follows that for the purpose of securing a minimum of nutrients in a natural food in universal use, a state legislature may prohibit an inferior food used as a substitute for the genuine article. (*Powell v. Pennsylvania*, 127 U. S. 678, 8 S. Ct. 992, 32 L. Ed. 253; *Hebe v. Shaw*, 248 U. S. 297, 39 S. Ct. 125, 63 L. Ed. 255; *United States v. Carolene Products Co.*, 304 U. S. 144, 58 S. Ct. 778, 82 L. Ed. 1234.)

II

THE STATUTE IS SUSTAINABLE AS A MEASURE TO PROTECT THE PUBLIC AGAINST FRAUD AND DECEPTION

The facts found by the Kansas court show petitioners' product is manufactured and distributed in the same manner as evaporated milk. It is packaged in containers of the same size and number per case. It is advertised, displayed and held out to the public as milk, and is purchased, used and consumed as and for milk, and it has no other purpose. The ordinary housewife cannot distinguish between the product and genuine evaporated whole milk as to consistency, odor, taste or color.

While nothing is added to skim milk or cottonseed oil to change its odor or color, *the refining process, and the addition of hydrogen in the manufacturing process of the*

oil, renders its odorless, colorless and tasteless, so that it possesses the capacity to be mixed with skim-milk, and thereby not disturb the natural odor, taste or color of skim-milk.

It sells at approximately one cent per can under evaporated milk. Its ability to resist rancidity, and its whipping properties, are inducements to its purchase, regardless of its nutritional value. Retailers make forty cents per case on petitioners' product, and fifteen to twenty cents per case on nationally known brands of evaporated milk. (R. 510, F. 35.)

Petitioners' business is a profitable one. In 1940 it received over a million dollars more from whole milk purchased and converted into butter and filled-milk, than petitioners would have received had they made only evaporated milk from the raw milk so purchased. (R. 504, F. 2; R. 510, F. 35.)

The conclusion deductible from these facts is that petitioners' product is designed to attract a public ignorant of nutritional value which purchases because of price, or because the product whips, or resists rancidity, or because of inertia and lack of interest of the consumer in the nutritional value of foods. The product has no other use than as a substitute for evaporated whole milk, and

is so used. Under these facts the statute is constitutional as a protection against fraud, imposition and confusion in the sale and use of foods.

Petitioners contend, however, that they have no intent to defraud, and that their label speaks the truth. The same contention was made in the case of *Carolene Products Co. v. Mohler*, 152 Kan. 2, 10, 102 P. 2d 1044, wherein the Kansas court observed that it was not a case of active fraud against which the statute was directed, but a condition which the legislature no doubt could have conceived would exist if fats or oils were permitted to be added to whole milk derivatives, and that such condition was one of the things which the legislature in its wisdom had a right to guard the public against.

Truthful labeling is not always adequate protection to the public. (*Hebe Co. v. Shaw*, 248 U. S. 297, 39 S. Ct. 125, 63 L. Ed. 255; *U. S. v. Carolene Products Co.*, 304 U. S. 144, 58 S. Ct. 778, 82 L. Ed. 1234; *Federal Security Administrator v. Quaker Oats Co.*, 318 U. S. 218, 63 S. Ct. 589, 87 L. Ed. 724.)

Petitioners contend that if the legislature thought there might be consumer confusion in the purchase of their product, regulation would be adequate to protect the

public. In what manner would regulation be adequate? Petitioners put a notice in every case stating that "It is improper to advertise, represent, display or sell either of these products as milk or evaporated milk or cream." Of what purpose is such notice unless Carolene Company knows the product was advertised, represented, displayed and sold by retailers as and for milk, evaporated milk or cream? What is the effect of such notice? The findings of the Kansas court are, that the product was generally sold contrary to such warnings.

In the opinion below the Kansas court stated in the reported case, at page 412 (R. 660.)

> "Our independent examination of the record leads us to believe that notwithstanding the label correctly describes the contents of the product . . . . and notwithstanding the fact the defendant Carolene Products Company puts into the cases of its product a "Notice" . . . the product nevertheless in numerous instances is sold as canned milk by dealers, accepted as such by customers and is used as advertised by the defendant Carolene Products Company, to-wit, 'Milnot can be used for all culinary purposes wherever you now use whole milk, cream, whipping cream or a canned milk.'"

This is sufficient justification for the legislative discretion of prohibition rather than regulation. (*Powell v.*

Pennsylvania, 127 U. S. 678, 8 S. Ct. 992, 32 L. Ed. 253; *U. S. v. Carolene Products Co.*, 304 U. S. 144, 58 S. Ct. 778, 92 L. Ed. 1234.)

The petitioners indicate that there were only a few instances where the product was advertised, represented, displayed and sold as and for milk. The State obviously could not and did not undertake to include in its survey every grocery store in the state. A fair sampling of stores was had and the results of the survey show that the product is generally confused with milk by grocers who offer it and advertise it as milk to consumers. Of the twenty-eight stores called upon by one investigator, who asked for cheap, canned milk, a majority sold Carolene without disclosing that the product they were selling in response to requests for canned milk was not milk. Three other inspectors made surveys, and found that the product in most instances was displayed on the shelves alongside evaporated milk. (R. 693, F. 31.)

More than fifty percent of the retail grocery advertisements introduced into the record showed that the product was advertised as "milk." (R. 694, F. 34.)

For petitioners to say that the product is fairly labeled and sold on its merits without fraud on the public, is contrary to the proved facts found by the Kansas court.

The very assertion is contrary to the acts of the company. The product is manufactured to resemble evaporated milk. By removal of objectionable color and odor from the added oil, and by the addition of hydrogen, the product does resemble evaporated milk, and cannot be distinguished from it by the ordinary consumer. It is packed to resemble evaporated milk. It is displayed and represented as evaporated milk. (See picture of display window R. 625.) It is hold through the same channels as evaporated milk. It is recommended by the company for all purposes "wherever you now use whole milk." It is used for milk and cream, and has no other use. Under these facts can it fairly be said that the company has no intention that the product be sold as milk? The company knows it will be so sold. If the people did not think they were getting milk, there would be none of the product sold. There is nothing new about petitioners' product. Milk and skimmed-milk have been used by the people of the world for generations. Cottonseed oil has been used in shortening and in salad oils and dressings for many years. Cod liver oil contains vitamins "A" and "D," and has been used for centuries. (R. 684, 685, 686, F. 12, 13, 14, 15.)

These foods are available to the people of Kansas at

any time. Can there be a valid constitutional objection to a law which prevents the combining of these products in a can, and selling them as and for milk to persons wanting milk, who have no use for anything else but milk? The conclusion is obvious. If the product was not susceptible of sale through misrepresentation and consumer confusion, there would be no market for it. Carolene Products Company by its acts shows it knows this to be true, and its method of manufacture and sale of these three separate foods, compounded into one, is merely a means of defrauding the public for the pecuniary benefit of the company.

Conclusion

Where the legislative judgment is drawn in question, as to whether there is a conceivable reason for the act, the issue must be confined to whether any state of facts, either known or which can reasonably be assumed, afford support for it. (*U. S. v. Carolene Products Co.*, 304 U. S. 144, 154, 58 S. Ct. 778, 82 L. Ed. 1234.)

The burden was upon petitioners to show in the case at bar, either by facts that could be judicially noted, or by proof, that there was no conceivable reason for the legislative act. Petitioners have completely failed to

make such a showing. On the other hand, the State has conclusively shown that petitioners' product is lacking in essential nutrients contained in the well known food for which it is substituted, and the record further shows that such product is sold deceptively and fraudulently to consumers of the state. Under these circumstances it cannot be said that the Kansas statute violates the Fourteenth Amendment.

The presumption of constitutionality surrounds the statute, and in the absence of proof beyond reasonable doubt that there is no conceivable reason for the legislative act, the court is not entitled to substitute its judgment for what it believes the law ought to be. (*Rast v. Van Deman & Lewis Co.*, 240 U. S. 342, 36 S. Ct. 370, 60 L. Ed. 679; *U. S. v. Carolene Products Co.*, 304 U. S. 144, 58, S. Ct. 778, 82 L. Ed. 1234; *Carolene Products Co. v. Mohler, et al.*, 152 Kan. 2, 102 P. 2d 1044; *O'Gorman & Young v. Hartford Fire Ins. Co.*, 282 U. S. 251, 51 S. Ct. 130, 75 L. Ed. 324.)

Petitioners contend that the State has failed to prove its contention of showing the product to be unwholesome and harmful. As shown above, the burden of proof to show that there is no conceivable reason for the legislative act is upon the petitioners, not the State. The State

does not have to prove that there was justification for the act, as the law casts about the legislative act a presumption of constitutionality, and it is upon those who challenge it to show the contrary.

We meet throughout the brief the repeated statement by petitioners that the product is concededly a wholesome, nutritious and harmless food and that there is no disagreement on this point. In an effort to sustain this statement petitioners cite extracts of testimony of certain witnesses and cite their qualifications. We also could quote testimony and show high standing of the states witnesses. This is unnecessary as the commissioner heard the evidence and made his findings which the court below adopted. Petitioners have not complained in their petition for a writ, or in their brief, that the findings of fact made by the commissioner, and adopted by the Supreme Court, are not supported by the evidence. In the Commissioner's findings 50, 51, 52 and 53 it is shown that there was a conflict in the evidence, and the opinions of the experts disagreed as to the effect of the product when used, as it was intended to be used, as a substitute for whole milk in the diet of infants, children and adults. The Commissioner found this difference of opinion of experts as a matter of fact. In finding 53 the Commissioner did

not make an unqualified finding that defendants' product was wholesome, nutritious and harmless, as is repeatedly contended by petitioners, but that it was wholesome, nutritious and harmless in a limited way in the sense that it was non-toxic. He found that it was used in the diet of infants and children, and that, so used, such diet was inadequate, and that malnutrition diseases result from inadequate diet. Thus used, the product is not wholesome, nutritious and harmless.

The continued use by petitioners of the expression "Carolene is concededly a wholesome, nutritious and harmless food;" is a relative expression. It is like saying a rope is long. As petitioners use the term it is a half truth. The product is not wholesome, nutritious, or harmless when it replaces milk in the diet of infants and children who do not consume a varied diet.

The State concedes that the petitioners' product is not dirty or unsanitary, and that it is non-toxic, but does not concede that it is wholesome, nutritious and harmless when it is used as it is used in the diet of infants and children to the exclusion of whole milk products. Petitioners use the terms "wholesome, nutritious and harmless" to mean adequacy of nutritional requirements as provided by the genuine, natural food product for which it

is substituted. The proved facts found by the Commissioner, and adopted by the Court, show this not to be true. This product, lacking in many essential nutrients, intended to replace milk, and actually replacing milk in the diet of infants, children and adults, and having no other purpose, crowds out of the diet of the people a milk proved over centuries to supply certain essential nutrients nowhere else to be found. Under these circumstances the product is unwholesome, unnutritious and harmful, resulting in malnutrition by reason of its inferior nutritive value.

Petitioners contend that whole milk is not a complete food, and, to be complete, must be modified and supplemented. The record shows that medical experience has developed simple ways to supplement cow's milk so that it is entirely adequate as a food for infants. On the other hand, petitioner's product, even though it be modified as is milk, cannot be made a suitable substitute since it has been proved to be deficient in known essentials contained in milk fat and lacking in cottonseed oil.

If the character or effect of an article, as intended to be used, be debatable, the legislature is entitled to its own judgment, and its judgment cannot be superseded by the views of the Court. (*Carolene Products Co. v. Mohler,*

152 Kan. 2, 102 P. 2d 1044; *Powell v. Pennsylvania*, 127 U. S. 678, 685, 8 S. Ct. 992, 32 L. Ed. 253; *Hebe Co. v. Shaw*, 248 U. S. 297, 303, 39 S. Ct. 125, 63 L. Ed. 255; *U. S. v. Carolene Products Co.*, 304 U. S. 144, 154, 58 S. Ct. 778, 82 L. Ed. 1234; *Setzer v. Mayo*, 150 Fla. 734, 9 So. 2d 281.) Here both the character and effect of Carolene as intended to be and as used is debatable. Its prohibition is a matter for legislative discretion.

The majority opinion of the Kansas court held that it was not a question as to what the judges might think regarding the inferiority of the defendants' product as compared with whole milk or evaporated whole milk, but that "if substantial disagreement in fact exists with respect to the inferiority . . . and the product is likely to be sold or is susceptible of being sold . . ." for milk it may be prohibited. (R. 660, 157 Kan. 404, 412.)

The court then stated:

> "In other words, in the view we take of the law governing this case the sale of a filled-milk product, although wholesome and nutritious, may be constitutionally prohibited as well as merely regulated if the legislature has some basis for believing the product is inferior to whole milk or evaporated whole milk and that the sale of the product offers an opportunity for fraud and deception and that prohibition rather than mere regulation of its sale is necessary for the adequate

protection of the public health or general welfare. *We think there was a sufficient basis for the exercise of legislative judgment as to a filled-milk product and the remedy adopted to effect the legislative purpose.*" *P. 412.* (Italics ours.)

Petitioners take the position that the Kansas court in making substantial disagreement the basis of their opinion would justify the banning of milk on the theory that there is a substantial disagreement as to whether milk is as wholesome and nutritious as Carolene, and that the statute fixes no standards for milk. Petitioners evidently have not read all of section 707 of the statute of which subsection (F) (2) forms a part. Milk is a natural food. It contains nutritional elements that science has not been able to duplicate. It is in and of itself a standard product. 65-707, G. S. Kan. 1935 protects its identity, defines whole milk, cream, skim-milk, evaporated and condensed whole milk, and condensed skim-milk, as well as other derivatives of milk. The section in question (F) (2), preventing addition of a foreign fat, is to protect the identity and integrity of the natural food "milk." Petitioners speak of selling skim-milk. They do not sell skim-milk, but *evaporated* skim-milk to which they add vitamins "A" and "D" and cottonseed oil. Under subsection (F) (3)

of 707 condensed skim-milk cannot be legally sold in Kansas except in containers of not less than ten pounds.

It is thus seen that milk is the basic food which the statute seeks to protect from adulteration, so that the public will be able to obtain that which they know to be fundamentally an adequate food in their diet. The petitioners say that the position of the Kansas court thus shuts the door to improvement of milk products. We respectfully submit that there is no evidence or findings showing petitioners have made a product superior or equal to that natural food product "milk." If there be any question about the comparative nutritive value of petitioners' product over milk in the diet of animals, observance of the pictures of rats fed petitioners product compared with milk dispel any doubt. (See picture R. 576 and Chart R. 575, rats and calves fed vegetable oils, including cottonseed oil. R. 581, 582, 586, 587, 589, 591.)

Petitioners have followed the reasoning of the minority of the Kansas court, and of the cases in *People v. Carolene Products Co.*, 345 Ill. 166, 177 N. E. 698, followed in *Carolene Products Co. v. McLaughlin*, 365 Ill. 62, 5 N. E. 2d 447; *Carolene Products Co. v. Thompson*, 276 Mich. 172, 267 N. W. 608; *Carolene Products Co. v. Banning*, 131 Neb. 429, 268 N. W. 313, which cases represent a minority

view on the power of the legislature to secure a minimum of nutrients in a well known natural food. The three cases above cited all were decided prior to the decision of this Court in *U. S. v. Carolene Products Co.*, 304 U. S. 144, 58 S. Ct. 778, 82 L. Ed. 1234, and their doctrine has been rejected by five later cases decided by supreme courts of Pennsylvania, Missouri, Kansas, Kentucky and Florida.

Petitioners further rely upon certain cases involving oleomargarine, which need no comment other than that they are not applicable to the facts before this court. There is no evidence that oleomargarine gets into the channels of infant nutrition as does petitioners' product. Petitioners cite *Weaver v. Palmer Bros. Co.*, 270 U. S. 402, 46 S. Ct. 320, 70 L. Ed. 654, for the proposition that the Kansas statute cannot be sustained on the ground of public health, and that regulation would be adequate. The issue in the Weaver case was one of sanitation against which sterilization adequately protected the public. Such question is not involved in this case.

Petitioners cite the discussion in the minority opinion below where it was indicated that *Powell v. Pennsylvania* was overruled by *Schollenberger v. Pennsylvania*, 171 U. S. 1, 18 S. Ct. 757, 43 L. Ed. 49. The Schollenberger case merely held that a state could not interfere with in-

terstate commerce by prohibiting shipment into a state of a product recognized by Congress to be a proper subject of commerce. Not only do we have here a federal statute making it unlawful to ship filled-milk in interstate commerce, but the Kansas law does not prohibit the shipment of the product into the state in interstate commerce. (See G. S. Kan. 1935, 65-717, set forth in the Appendix.)

The majority of the cases have sustained the constitutionality of the state laws. (*Hebe Co. v. Shaw*, 248 U. S. 297, 39 S. Ct. 125, 63 L. Ed. 255; *Reiter v. State of Maryland*, 109 Md. 235, 71 Atl. 975; *State v. Emery*, 178 Wis. 147, 189 N. W. 564; *Carolene Products Co. v. Harter*, 329 Pa. 49, 197 Atl. 627; *Poole & Creber Markets v. Breshears*, 343 Mo. 1133, 125 S. W. 2d 23; *Carolene Products Co. v. Hanrahan*, 291 Ky. 417, 164 S. W. 2d 597; *Setzer v. Mayo*, 150 Fla. 734, 9 So. 2d 281; *Carolene Products Co. v. Mohler*, 152 Kan. 2, 102 P. 2d 1044; *State v. Sage Stores Co.*, 157 Kan. 404, 141 P. 2d 655.)

The federal act has been sustained in *United States v. Carolene Products Co.*, 304 U. S. 144, 58 S. Ct. 778, 82 L. Ed. 1234; *Carolene Products Co. v. Wallace*, 27 F. Supp. 110, affirmed 307 U. S. 612, 59 S. Ct. 1033, 83 L. Ed. 1495; *Carolene Products Co. v. Wallace*, 30 F. Supp. 266,

affirmed 308 U. S. 506, 60 S. Ct. 413, 84 L. Ed. 433; *U. S. v. Hauser, et al.*, 140 F. 2d 61, now pending before this court on a writ of certiorari.

It is unnecessary to review these decisions, as the majority opinion of the Kansas court below followed the principles announced in these federal and state decisions representing the majority view.

The facts proven in the case at bar show that 65-707 (F) (2), General Statutes of Kansas 1935, does not deny to petitioners any rights guaranteed by the Fourteenth Amendment to the Constitution of the United States.

Respectfully submitted,

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Appendix

TEXT OF KANSAS STATUTES RELATING TO CONSTITUENTS, TESTS, AND HANDLING OF MILK, CREAM, BUTTER, CHEESE AND ICE CREAM

65-707, G. S. Kan. 1935. (A) (1) Whole milk is the lacteal secretion obtained by the complete milking of one or more healthy cows, properly fed and kept, excluding that obtained within fifteen days before and five days after calving, and when offered for sale must contain not less than three and one-fourth percent of butterfat; (2) milk for manufacturing purposes may contain less than three and one-fourth percent of butterfat, but must be delivered pure, sweet and clean; (3) for the purposes of this act, skimmed milk shall be considered to be such milk as has had all or a portion of the butterfat removed.

(B) (1) Cream is that portion of milk rich in butterfat which rises to the surface of the milk on standing or is separated from it by centrifugal force, and contains not less than eighteen percent of butterfat. (2) All cream shall be graded according to the following rules, and each grade shall be kept in a separate can, plainly marked to indicate the grade contained therein. (a) First-grade cream shall consist of cream that is clean, smooth, free from undersirable odors, clean to the taste, and sweet or only slightly sour. (b) Second-grade cream shall consist of cream that is too sour to grade as first, that contains undesirable flavors or odors in a moderate degree, that is foamy, yeasty or slightly stale, or that is too old to pass as first-grade cream. All sour cream containing less than twenty-five percent butterfat shall be graded as second grade. It shall be unlawful to falsely grade cream, or to

mix cream of different grades, or to offer for sale or purchase for use as human food, unlawful cream as herein defined. (c) Unlawful milk or cream shall consist of milk or cream that is very old, rancid, moldy, dirty or curdy, which contains or has contained any foreign matter, or in which has been found insanitary articles or utensils, and such milk or cream shall not be purchased, sold or used for food purposes. It shall be unlawful to sell or offer for sale, or ship with the intent of selling, to any purchaser any milk, cream or other dairy product that has contained or does contain any foreign substance that renders said milk, cream or other dairy product unfit for human food. Persons engaged in milk or cream buying are hereby required, when offered unlawful milk or cream, to treat it with Venetian red sufficiently to show unmistakably that such cream is unfit to be used in the manufacture of human food. (3) No part of any shipment of milk or cream to be used in the manufacture of food products shall be delivered to a carrier in an unwholesome condition.

(C) (1) Butter is the product made by gathering, in any manner, the fat of fresh or ripened milk or cream into a mass which also contains not less than eighty percent of butterfat or made in accordance with such standards as shall be established by the department of agriculture of the United States: *Provided*, That the amount of butterfat in the product of any one manufacturer, or in any given quantity of butter, shall be determined as hereinafter provided with reference to renovated or process butter; butter may also contain a harmless vegetable coloring matter. (2) Renovated or process butter is the product made by melting butter and reworking, without the addition or use of chemicals or any substance except

milk, cream or salt, and contains not less than eighty per-cent of butterfat, or made in accordance with such standards as shall be established by the department of agriculture of the United States: *Provided*, That the amount of butterfat in the product of any one manufacturer, or in any given quantity of butter, renovated or process butter, shall be ascertained in the following manner, to-wit: Five samples shall be taken from five different packages of any one manufacturer, or from any one tub or churning of butter, and a careful analysis made by the official metheod adopted by the Association of Agricultural Chemists. If this analysis shall show less than eighty percent of butterfat, butter or process butter thus analyzed shall be deemed adulterated butter, and the manufacturer shall be deemed guilty of a misdemeanor and the butter must be reworked before again being offered for sale. Renovated or process butter may also contain a harmless vegetable coloring matter.

(D). (1) Cheese is the solid and ripened product made by coagulating the casein of milk by means of rennet or acids, with or without the addition of ripening ferments or seasoning; cheese may also contain harmless vegetable coloring matter; (2) whole milk or full cream cheese is cheese made from milk from which no portion of the fat has been removed and contains not less than fifty percent of butterfat in proportion to total solids; (3) skim-milk cheese is cheese made from milk from which any portion of the fat has been removed.

(E) (1) Ice cream is a frozen product containing not less than ten percent of milk fat; not less than a total of twenty percent milk solids, and not less than thirty-three percent total solids; said product consisting of a flavored, sugar-sweetened mixture of cream or cream and milk, or or the sweet, pure products of cream and milk, with or

without the addition of gelatin, vegetable gums, or such other wholesome stabilizers as may be approved by the state dairy commissioner, to which mixture may be added pure, fresh, sweet, wholesome eggs, fruit or fruit juice, cocoa, chocolate or nuts. (2) All milk, cream and milk products shall be pasteurized before used in the manufacture of ice cream. Pasteurization for the purposes of this act is defined to mean the heating of the milk, cream or milk products used in the manufacture of ice cream to a temperature of at least 145 degrees Fahrenheit and held at said temperature for thirty minutes. All pasteurizing vats used for pasteurizing ice cream mix, or milk and cream used in the manufacture of ice cream, shall be equipped with a recording therometer, and for each vat of milk, cream, or ice cream mix pasteurized, a separate record chart shall be used; said charts being dated and kept on file until called for by the state dairy commissioner or deputy. It shall be unlawful to use any milk, cream or ice cream mix in the manufacture of ice cream without having on file, subject to the demand of the state dairy commissioner, a true record of pasteurization of said product. The facilities for holding said product at a low temperature until frozen must meet the approval of the state dairy commissioner. (3) Samples of ice cream taken for official test shall be taken with a butter trier from a full or nearly full can of ice cream in solid condition, or from the ice cream freezer.

(F) (1) It shall be unlawful to sell, keep for sale or offer for sale any condensed or evaporated milk, concentrated milk, sweetened condensed milk, sweetened evaporated milk, sweetened concentrated milk, sweetened condensed skimmed milk, sweetened evaporated skimmed milk, sweetened concentrated skimmed milk, which shall not conform at least to the minimum standards herein-

after provided. Condensed milk, evaporated milk or concentrated milk is the product resulting from the evaporation of a considerable portion of the water from whole, fresh, clean milk, and contains, all tolerances being allowed for, not less than twenty-five and five-tenths percent (25.5%) of total solids and not less than seven and eight-tenths percent (7.8%) of milk fat. Sweetened condensed milk, sweetened evaporated milk or sweetened concentrated milk is the product resulting from the evaporation of a considerable portion of the water from whole, fresh, clean milk, to which sugar (sucrose) has been added. It contains, all tolerances being allowed for, not less than twenty-eight percent (28%) of total milk solids, and not less than eight percent (8%) of milk fat. Condensed skimmed milk, evaporated skimmed milk, concentrated skimmed milk, is the product resulting from the evaporation of a considerable portion of the water from skimmed milk, and contains, all tolerances being allowed for, not less than twenty percent (20%) of milk solids. Sweetened condensed skimmed milk, sweetened evaporated skimmed milk, sweetened concentrated skimmed milk, is the product resulting from the evaporation of a considerable portion of the water from skimmed milk to which sugar (sucrose) has been added. It contains, all tolerances being allowed for, not less than twenty-eight percent (28%) of milk solids. (2) *It shall be unlawful to manufacture, sell, keep for sale, or have in possession with intent to sell or exchange, any milk, cream, skim milk, buttermilk, condensed or evaporated milk, powdered milk, condensed skim milk, or any of the fluid derivatives, of any of them to which has been added any fat or oil other than milk fat, either under the name of said products, or articles or the derivatives thereof, or under any fictitious or trade name whatsoever.* (3) It

shall be unlawful to sell, keep for sale or offer for sale any condensed or evaporated or powdered skim milk in containers holding less than ten (10) pounds avoirdupois net weight, and each said container shall bear the name and address of the manufacturer, distinctly branded, indented, labeled or printed thereon, together with the words "condensed skim milk" or "powdered skim milk," as the case may be, in roman letters of a size at least as large as any other words or letters appearing on said brand, indentation or label." (Italics ours.)

65-717, G. S. Kan. 1935. "Nothing in this act shall be construed to prohibit the shipment into this state from a foreign state, and the first sale thereof in this state in the original package intact and unbroken, of any of the products or articles, the manufacturer, sale or exchange of which or possession of which with intent to sell or exchange is prohibited hereby."

SUPREME COURT OF THE UNITED STATES.

No. 34.—October Term, 1944.

The Sage Stores Company and Carolene Products Company, Petitioners, vs. The State of Kansas, *ex rel.* A. B. Mitchell (substituted as Attorney General.	On Writ of Certiorari to the Supreme Court of the State of Kansas.

[November 6, 1944.]

Mr. Justice Reed delivered the opinion of the Court.

An original action in quo warranto in the Supreme Court of the State of Kansas was begun against The Sage Stores, a Kansas corporation, and Carolene Products Company, a Michigan corporation, by the State of Kansas on the relation of its Attorney General. The purpose of the proceeding was to stop the sale or offering for sale in Kansas of filled milk, manufactured by the Michigan corporation and sold by the Kansas corporation. A judgment granting this relief was entered by the Supreme Court of Kansas. 157 Kans. 404.

A petition for a writ of certiorari was filed by both corporations and granted by this Court, 321 U. S. 762, to examine a single issue presented by the petition, to wit, whether the Kansas statute, which prohibits the selling or keeping for sale of the products of the Carolene Products Co., was an arbitrary, unreasonable and discriminatory interference with petitioners' rights of liberty and property in violation of the due process and equal protection of law clauses of the Fourteenth Amendment of the Constitution of the United States. A similar question as to the federal Filled Milk Act under the Fifth Amendment is decided today by this Court, *Carolene Products Co., et al* v. *United States*, No. 21, 1944 Term. Little need be added to that opinion.

The Kansas statute was first passed in 1923. Rev. Stat. Kans. 1923, § 65-713. It was reenacted as it now stands in 1927. Laws of Kans. 1927, c. 242, sec. 3, ¶ (2). It reads as follows:

"It shall be unlawful to manufacture, sell, keep for sale, or have in possession with intent to sell or exchange, any milk, cream,

skim milk, buttermilk, condensed or evaporated milk, powdered milk, condensed skim milk, or any of the fluid derivatives of any of them to which has been added any fat or oil other than milk fat, either under the name of said products, or articles or the derivatives thereof, or under any fictitious or trade name whatsoever." Sec. 65-707(F)-(2), Gen. Stat. Kans. 1935.

The compounds which petitioners manufacture and sell are covered by this statute. They are the same compounds which are described in *Carolene Products Co.* v. *United States*, *supra*. Petitioners' defense is that the compounds are sanitary and healthful. They assert that the canned compound is properly labeled and that no fraud is practiced upon the buying public to induce it to use petitioners' compound instead of whole milk products. It is admitted that the ordinary consumer cannot distinguish between the compounds and evaporated whole milk by odor, taste, consistency or other means short of chemical analysis. *State* v. *Sage Stores Co.*, 157 Kans. 404, 443, Finding 33.

In these circumstances, it is petitioners' contention that Kansas' prohibition of the keeping or sale of this healthful product violates the due process and equal protection clauses of the Fourteenth Amendment.

Apparently the objection under the equal protection clause is that the Kansas statute permits the sale of skimmed milk which has less calories and fewer vitamins than petitioners' compound and yet forbids the sale of the compound despite its higher nutritive value. Such an objection is governed by the same standards of legislation as objections under the due process clause. It is a matter of classification and the power of the legislature to classify is as broad as its power to prohibit. A violation of the Fourteenth Amendment in either case would depend upon whether there is any rational basis for the action of the legislature. *United States* v. *Carolene Products Co.*, 304 U. S. 144, 153-54; *Carmichael* v. *Southern Coal Co.*, 301 U. S. 495, 509.

This writ of certiorari brings to us only the question of the violation by the Kansas legislation of the Fourteenth Amendment. The coverage of the Kansas statute is a matter solely for the determination of Kansas. *Allen-Bradley Local* v. *Board*, 315 U. S. 740, 747; *United States* v. *Texas*, 314 U. S. 480, 487. In this case evidence was introduced as to the deficiencies in certain particulars of petitioners' compounds as compared with whole milk products. The findings of the commissioner who acted for the

Supreme Court of Kansas appear in *State* v. *Sage Stores Co.*, 157 Kans. 430. His conclusions, which were accepted by the court as to the properties of petitioners' compound may be gauged by his finding 53, *State* v. *Sage Stores Co.*, 157 Kans. at pp. 449-50.

"Defendant's product is wholesome, nutritious and harmless, in the sense that it contains nothing of a toxic nature, but it is inferior to evaporated whole milk in the content of fatty acids, phospholipins, sterols and Vitamins B and K, all of which are essential in human nutrition, with the probable exception of Vitamin E in the diet of infants. In addition, evaporated whole milk contains a superior growth-promoting property, found in butterfat and not in cottonseed oil, essential to the optimum growth of infants.

"These deficiencies in defendant's product, as compared to evaporated whole milk, are largely made up from other sources when the product is used as a substitute for whole milk or evaporated whole milk in the diet of adults who consume a varied diet. When defendant's product is used as a substitute for whole milk or evaporated whole milk in the diet of infants and children who do not consume a varied diet, such deficiencies are not made up, and the diet is partially inadequate. Defendant's product does 'get into the channels of infant nutrition.'".

It was also determined by the commissioner and approved by the court that one purpose of the legislature was the prevention of fraud and deception in the sale of these compounds. *State* v. *Sage Stores Co.*, 157 Kans. 404, 412-13.

As a consequence of this evidence, findings of fact and conclusions of law, the rational basis for the action of the legislature in prohibiting the [redacted] of the compounds is even more definite and clear than in *Carolene Products Co.* v. *United States*, decided today. Since petitioners' products had the taste, consistency, color and appearance of whole milk products, we need not consider the validity of the Kansas act as applied to compounds which are readily distinguishable from whole milk compounds. Reference is made to part "Third" of the *Carolene* opinion for a discussion as to whether or not a prohibition of these products violates due process.

In our opinion the Kansas legislation did not violate the Fourteenth Amendment.

Affirmed.

Mr. Justice BLACK and Mr. Justice DOUGLAS concur in the result.

sale, or keeping for sale,